

AUG 13 1986

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

At 2:55 clock P.M.
MARCH FONG EU, Secretary of State

SACRAMENTO, CALIFORNIA

In re:	)	1986 OAL Determination No. 5/2
Request for Regulatory)	
Determination filed by	)	[Docket No. 85-002]
the Center for Public)	
Interest Law, University	)	August 13, 1986
of San Diego School of)	
Law, concerning the	)	Determination Pursuant to
booklet "Professional	)	Government Code section
and Vocational	)	11347.5; Title 1, California
Regulations" issued	)	Administrative Code, Chapter
by the Board of	)	1, Article 2
Osteopathic Examiners/1)	

Determination by: LINDA HURDLE STOCKDALE BREWER, Director

Herbert F. Bolz and Debra M. Cornez

THE ISSUE PRESENTED/3

The Center for Public Interest Law, University of San Diego School of Law (Center) has requested the Office of Administrative Law (OAL) to determine whether or not the booklet titled "California Board of Osteopathic Examiners; Professional and Vocational Regulations" (booklet), issued by the California Board of Osteopathic Examiners (Board) is a regulation as defined in Government Code section 11342(b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA)./4

THE DECISION/5, 6, 7

The Office of Administrative Law finds that the above noted booklet (1) is subject to the requirements of the APA, (2) is a regulation as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA./8

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I. AGENCY AND AUTHORITY; BACKGROUND

The California Board of Osteopathic Examiners/9 (hereinafter referred to as the "Board") was established by the Osteopathic Act, an initiative statute originally approved by the voters on November 7, 1922./10 The Board is responsible for enforcing the provisions of the Medical Practice Act/11 relating to persons holding or applying for physician's and surgeon's certificates issued by the Board of Osteopathic Examiners under the Osteopathic Act./12

Osteopathic Act section 1 provides in part that the Board "may from time to time adopt such rules as may be necessary to enable it to carry into effect the provisions of this act."/13 (Emphasis added.) This Osteopathic Act is an initiative statute.

According to article 2, section 10(c) of the California Constitution, an initiative statute differs from an ordinary statute in one important respect. Unless the initiative statute itself provides otherwise, it may be amended or repealed by an ordinary statute only if the second statute is approved by the voters--in addition to being passed by the Legislature.

In 1962 the voters added the following provision as section 3 of the Osteopathic Act/14, authorizing modification of the Act by ordinary statute:

"This act, as amended, may be further amended or modified by the Legislature. In addition to such power to amend or modify, the Legislature shall have the power to repeal this act, as amended, in its entirety, and transfer any or all of its functions to the Board of Medical Examiners, in the event that the number of persons who are subject to the jurisdiction of the Board of Osteopathic Examiners reaches 40 or less. . . ." [Emphasis added.]

The Legislature has in substance modified the Osteopathic Act's express grant of rulemaking power to the Board by enacting the following provisions of the Business and Professions Code, which make clear that the Board is bound by APA rulemaking requirements./15 Business and Professions Code section 2451 provides:

"The words 'Board of Medical Quality Assurance,' the term 'board' or any reference to a division of the Board of Medical Quality Assurance as used in this chapter

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[Business and Professions Code, division 2, chapter 5, sections 2000 et seq.] shall be deemed to mean the Board of Osteopathic Examiners, where the board exercises the functions granted to it by the Osteopathic Act."
[Emphasis added.]

As noted, the functions granted to the Board by the Osteopathic Act include the authority to "from time to time adopt such rules as may be necessary to enable it to carry into effect the provisions of this act."

The procedures the Board must follow in adopting such rules are specified in Business and Professions Code section 2018, which states:

"Each division of the board [i.e., here, the Board of Osteopathic Examiners] may, within its jurisdiction, adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, such regulations as may be necessary to enable it to carry into effect the provisions of law relating to the practice of medicine. [Emphasis added.]

In light of the above provisions of law, we conclude that the Board is fully subject to the Administrative Procedure Act, including the recently added Government Code section 11347.5.

The following facts and circumstances have given rise to the present Determination.

The duly adopted regulations of the Board of Osteopathic Examiners are found in chapter 16 of title 16, California Administrative Code (CAC). Chapter 16 encompasses 13 articles, which contain a total of 64 regulatory sections. These sections are numbered 1600 through 1697. The most recent update to chapter 16 (pp. 144.5, 144.6, 146.6.3, 146.6.4) is dated December 12, 1981 (Register 81, No. 50).

Several years ago, however, the Board published a booklet entitled "California Board of Osteopathic Examiners; Professional and Vocational Regulations" ("booklet"). This 21-page booklet is nearly the same size as the CAC, approximately 6 x 9 inches, and is similar in appearance to the CAC.

This booklet contains 13 articles, including a total of 61 sections. These sections are numbered 1600 through 1695.5. What makes this booklet noteworthy is that the "regulations" it contains are substantially different in numerous instances from the official text of the parallel CAC provisions.

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Time does not permit us to discuss all the inconsistencies between the booklet and the CAC./16. We will focus our discussion on one noteworthy discrepancy. Title 16 CAC section 1690(a)(6) states that the "annual tax and registration fee" shall "not exceed \$200.00 per year" (emphasis added). By contrast, booklet section 1690(a)(3) provides that this annual license renewal fee is "not to exceed \$400.00 per year" (emphasis added).

In order to understand the situation created by the Board's actions in (1) adopting the \$200 limit in regulation and then (2) attempting to raise the limit to \$400 by issuing the booklet, we turn to the pertinent provisions of the Osteopathic Act and the Business and Professions Code.

Osteopathic Act Section 1 requires all holders of osteopathic licenses to pay an "annual tax and registration fee prescribed by law."/17 Business and Professions Code section 2455 currently provides in part that:

" . . . an annual tax and registration fee shall be set by the Board . . . which shall not exceed four hundred dollars (\$400)"

This statutory limit was raised from \$200 to \$400 effective February 18, 1982./18

By placing the earlier \$200 renewal fee limit in regulation, the Board limited the fee it could legally assess to \$200. When the statutory limit went up to \$400, the regulatory limit nonetheless stayed at \$200. By including the \$400 limit in the booklet, the Board evidently intended to reflect the 1982 statutory change. Indeed, the clear purpose of the booklet was to informally amend a regulation by replacing a properly adopted regulatory provision with a document of lesser stature which was nonetheless intended to have identical legal effect.

II. OVERVIEW OF PRELIMINARY ISSUES DECIDED

The Center's Request for Determination asks OAL (1) to determine the legality of the "rulemaking practices" of the Board, and (2) to render an advisory opinion as to the validity of all Board actions taken pursuant to the booklet since 1981--in addition to the dispositive issues presented below.

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Conclusions

We conclude that the issue before OAL is whether the Board's booklet is an underground regulation./19 OAL does not issue determinations nor render advisory opinions regarding the legality of an agency's "rulemaking practices" or the validity of its actions.

III. OVERVIEW OF DISPOSITIVE ISSUES DECIDED

The Center's request raises the following issues:

WHETHER THE ISSUANCE OF THE CHALLENGED RULE WAS AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE BOARD.

WHETHER THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS ARE GENERALLY SUBJECT TO THE REQUIREMENTS OF THE APA.

WHETHER THE CHALLENGED RULE IS A REGULATION AS THAT TERM IS BASICALLY DEFINED IN THE APA.

WHETHER THE CHALLENGED RULE FALLS WITHIN ANY RECOGNIZED EXCEPTION TO APA REQUIREMENTS.

Conclusions

We conclude that:

The Board exercised its quasi-legislative power by issuing the challenged rule.

The Board's quasi-legislative enactments are generally subject to the requirements of the APA.

The challenged rule is a regulation as that term is basically defined in the APA.

The challenged rule does not fall within the exception for "rates, prices, or tariffs" or any other recognized exception to APA requirements.

IV. DISCUSSION OF PRELIMINARY ISSUES

OAL does not issue determinations on the legality of an agency's "rulemaking practices." In the exercise of its authority pursuant to Government Code section 11347.5, OAL

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issues determinations as to the legality of a specific "guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule. . . ." The OAL regulations implementing Government Code section 11347.5 further clarify that only specific "rules" may be challenged in a regulatory determination proceeding./20

Other than as specified above, OAL does not in the regulatory determinations context issue opinions concerning the validity of agency actions.

V. DISCUSSION OF DISPOSITIVE ISSUES

There are four main issues before us:/21

- (1) WHETHER THE ISSUANCE OF THE CHALLENGED RULE CONSTITUTES AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE BOARD.
- (2) WHETHER THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS ARE GENERALLY SUBJECT TO THE REQUIREMENTS OF THE APA.
- (3) WHETHER THE CHALLENGED RULE IS A REGULATION WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (4) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A RESULT OF THE EXERCISE OF THE BOARD'S QUASI-LEGISLATIVE POWERS./22

The term "quasi-legislative" is not defined in the APA. In determining whether a rule is the result of the exercise of quasi-legislative power we consider three elements:

- 1) The judicial definition of the term "quasi-legislative";
- 2) Whether the state agency in question has been granted pertinent quasi-legislative powers; and
- 3) Whether the rule in question meets the basic definition of "regulation" set out in Government Code section 11342.

Does the issuance of the challenged rule constitute an exercise of "quasi-legislative" power as that term has been judicially defined?

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According to the California Supreme Court, a quasi-legislative rule is one formulating a general policy oriented toward future decisions, rather than the application of a rule to the peculiar facts of an individual case./23

We conclude that the issuance of section 1690(a)(3) by the Board constitutes an exercise of quasi-legislative power as defined above. Clearly, the Board's decision to set the amount for the annual tax and registration fee was quasi-legislative in nature--it was a general policy intended to be binding on all current and future holders of osteopathic licenses.

Whether the state agency in question has been granted pertinent quasi-legislative power.

As discussed above in Part I, the Legislature has granted the Board power to adopt such regulations as may be necessary to enable it to carry into effect the provisions of law relating to the practice of medicine./24 Clearly, setting license renewal fees is within the scope of the power conferred.

Does the rule in question meet the basic definition of "regulation" under Government Code section 11342?

We conclude that section 1690(a)(3) meets the definition of "regulation" under Government Code section 11342. This point is discussed below in Part V(3).

SECOND, WE INQUIRE WHETHER THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS ARE GENERALLY SUBJECT TO THE APA.

As discussed above in Part I, the Board is specifically required by Business and Profession Code sections 2451 and 2018 to follow APA procedures in adopting rules and regulations.

Assuming for the sake of argument that the above provisions were not dispositive, we note that the APA applies to all state agencies, except those "in the judicial or legislative department."/25 Since the Board is neither in the judicial nor the legislative "department," there can be no doubt that APA rulemaking requirements generally apply to the Board./26

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THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(b) defines regulation as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . ."
[Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue . . . any guideline, criterion, bulletin [or] instruction . . . which is a regulation as defined in subdivision (b) of section 11342, unless the . . . guideline, criterion, bulletin [or] instruction . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."
[Emphasis added.]

Applying the definition found in Government Code section 11342(b) involves a two-part inquiry:

- (a) is the informal rule either (i) a rule or order of general application or (ii) a modification or supplement to such a rule?
- (b) does the rule being enforced either (i) implement, interpret, or make specific the law enforced or administered by the Board or (ii) govern the Board's procedure?

The answer to both parts of this inquiry is "yes."

First, section 1690(a)(3) is clearly a standard of general application. It applies, on a statewide basis, to every current and future holder of an osteopathic license.

Also, booklet section 1690(a)(3) modifies section 1690(a)(6), title 16 of the CAC. This CAC section provides for an annual tax and registration fee--"not to exceed \$200.00 per year," to be fixed by the Board. (Emphasis added.)

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Booklet section 1690(a)(3) provides that such a fee "shall not exceed . . . \$400.00 to be fixed by the Board. . . ." (Emphasis added.) Raising this maximum fee limit from \$200.00 to \$400.00 is clearly an informal modification of a duly adopted Board regulation.

Second, booklet section 1690(a)(3) implements two provisions of law enforced and administered by the Board. One such law is section 2455 of the Business and Professions Code which states in part:

"In addition, an annual tax and registration fee shall be set by the board . . . which shall not exceed four hundred dollars (\$400)" [Emphasis added.]

Section 1 of the Osteopathic Act is another law implemented by section 1690(a)(3). Section 1 provides in part:

"Every licentiate, or certificate holder, subject to the jurisdiction of this board, shall on or before the first day of January of each year pay to the secretary-treasurer the annual tax and registration fee prescribed by law." [Emphasis added.]

The "law" to be enforced or administered by the Board thus includes not only ordinary statutory law, but also the law found in the pertinent initiative statute (the Osteopathic Act)./27

FOURTH, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA./28 One exception to APA requirements is arguably applicable here.

APA Exception for Rules That Establish or Fix Rates, Prices or Tariffs--Government Code Section 11343(a)(1).

Government Code section 11343(a)(1) provides:

"Every state agency shall:

- (a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted by it except one which:
 - (1) Establishes or fixes rates, prices or tariffs." [Emphasis added.]

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We conclude that the "annual tax and registration fee" required by section 1690(a)(3) is not exempt under Government Code section 11343(a)(1) in that it is not a "rate," "price," or "tariff."

We arrive at that conclusion for the following reasons:

- 1) APA exceptions should be narrowly construed to further the statutory goals of meaningful public participation in rulemaking and effective judicial review;
- 2) The above-noted statute exempts "rates," "prices," and "tariffs"--but not "fees";
- 3) The licensing fee rule currently under review involves a particularly significant issue--a situation in which the government is prohibiting members of the regulated public from pursuing their profession unless the official fee is paid.

Reasons "rate, price, or tariff" exception does not apply.

First, APA exceptions should in general be narrowly construed to further the APA's basic goals--meaningful public participation/29 and effective judicial review./30

A statute should be construed with a view toward promoting rather than defeating its general purpose and the policy behind it./31

As stated by the California Supreme Court, "[i]t is well established that a specific provision should be construed with reference to the entire statutory scheme of which it is a part."/32

As stated by the California Court of Appeal:

"When a statute contains an exception to a general rule laid down therein, that exception is strictly construed."/33

Finally, in interpreting a statute, it is proper to consider the consequences that will flow from a particular interpretation./34

Each time an APA exception is expansively interpreted, the extent to which the public can shape administrative enactments is diminished; the extent to which reviewing courts can have ready access to the documents associated with such enactments is lessened.

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Courts have on several occasions drawn attention to the fact that rules found to be exempt from APA requirements under the rate, price, tariff exception tend to be part and parcel of an alternative statutory system requiring noticed public hearings./35 No such alternative statutory scheme is apparent in the matter at hand.

Second, the statute exempts "rates," "prices," and "tariffs," but not "fees." None of these terms is defined in the APA. Our research has disclosed no evidence of the intent of the Legislature in enacting the rate, price, or tariff exception. However, it is significant that beginning even before the creation of OAL, California state agencies--including the Board of Osteopathic Examiners--have customarily filed "fee" regulations with the Secretary of State.

While it may be arguable that some enactments officially characterized as "fees" could nonetheless be legitimately exempt under the rate, price, or tariff exception on the grounds that they are in substance indistinguishable from "rates," "prices" or "tariffs," we reject the notion that "fees" in general are exempt from APA requirements./36 As stated by the California Supreme Court, "where exceptions to a general rule are specified by statute, other exceptions are not to be applied or presumed."/37

Third, the licensing fee rule under review involves the significant issue of the government prohibiting members of the regulated public from pursuing their profession unless the official fee is paid. This sort of fee is defined in Black's Law Dictionary as a "charge fixed by law . . . for use of a privilege under control of government."/38 Fees such as license fees or application fees should be distinguished from ordinary sales of goods or services./39

As a leading legal scholar has stated, this distinction should be made "because when licenses are issued an agency is acting less like an ordinary entrepreneur in the market place and more like a sovereign in the performance of functions which are viewed as unabashedly governmental in nature."/40

Citizens--the thesis holds--have a limited interest in participating in the fixing of governmental charges for ordinary goods such as "the price of carrots and peas in the [agency's] cafeteria line."/41 By contrast, "[s]ince the government has a monopoly of regulating functions and coercive legal power, the citizen has a greater interest in participating in the specification of charges appurtenant to such [unique] functions than in the specification of charges of a type normally encountered in the world at large."/42

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It is noteworthy that the fee here at issue is described in Business and Professions Code section 2455(a) as the "annual tax and registration fee" (emphasis added). The use of the word "tax" underscores the fact that imposition of the fee directly reflects coercive governmental power.

We note that "taxes" are not among the items listed in the APA exception under discussion. It is clear that--at a minimum--fees which are akin to taxes, such as the fee imposed by the government for a license to pursue a particular occupation, should not be deemed exempt from APA public notice and hearing requirements. An example of such a fee would be the Board of Chiropractic Examiners annual license renewal fee discussed in an earlier Determination./43 Though not labeled a "tax" as is the Osteopathic Examiners fee, the Chiropractic Examiners fee nonetheless reflects to the same degree coercive governmental power and thus could not be deemed immune from APA public notice and hearing requirements.

The foregoing is OAL's interpretation of Government Code section 11343(a)(1). OAL is the agency charged with the enforcement of the statute of which this provision forms a part. According to well-settled legal principles, the interpretation of a statute by the administrative agency charged with its enforcement is entitled to great weight./44

We conclude, therefore, that none of the available statutory or judicial exceptions apply to the challenged rule.

VI. CONCLUSION

For the reasons set forth above, OAL finds that the above noted booklet (1) is subject to the requirements of the APA, (2) is a regulation as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

NOTES

1. In this proceeding, the Center for Public Interest Law, University of San Diego, was represented by Gene Erbin, R. Clayton Welch, and Elizabeth Mulroy. The Board was represented by Executive Director Linda Bergmann.

2. SPECIAL NOTE:

After OAL receives a request for determination and commences active consideration of the matter, the request is assigned a number. Example: 85-001. This number will henceforth be known as the file's docket number and may be cited as: Docket No. 85-001.

In early 1986, when OAL issued a regulatory determination opinion in response to a request for determination and filed it with the Secretary of State, the opinion was assigned the same number as the file's docket number. Henceforth, the filed opinion will receive its own number and may be cited as: (example) 1986 OAL Determination No. 1. This new opinion number will appear in the right-hand column of the opinion's caption.

Example caption with new number shown:

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re:	)	1986 OAL Determination No. 1
Request for Regulatory)	
Determination filed by	)	[Docket No. 85-001]
Center for Public)	
Interest Law, University	)	April 8, 1986
of San Diego School of)	
Law, concerning License	)	Determination Pursuant to
Fee Increase ordered	)	Government Code Section
by State Board of	)	11347.5; Title 1, California
Chiropractic Examiners	)	Administrative Code,
	)	Chapter 1, Article 2

This change in the numbering system of OAL regulatory determination opinions was necessary to aid opinion recipients in implementing an accurate opinion filing system.

When referring to prior determinations, OAL will henceforth supply opinion number, docket number, California Administrative Notice Register publication date and page number, and looseleaf typewritten version page number.

A copy of the office's looseleaf typewritten version of the determination opinion is sent to the person who submitted the request for determination; to the affected state agency; to the Governor; to both Houses of the Legislature; to the State Law Library; and to all California state and federal courts. The opinion is then published in the California Administrative Notice Register. The Notice Register is distributed to each standing committee of each House of the Legislature, to each Member of the Legislature, to the State Law Library, and to all subscribers. Also, most county law libraries and law school libraries receive the Notice Register.

The following is an example of a footnote referring to a prior OAL determination opinion:

See 1986 OAL Determination No. 1 (State Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-10 and n. 2; looseleaf typewritten version, p. 1 and n. 2.

OAL hopes this SPECIAL NOTE will assist persons trying to locate a particular regulatory determination opinion.

The following list illustrates the new numbering system:

<u>Old No.</u>	<u>New No.</u>
85-001	1986 OAL Determination No. 1 (Docket No. 85-001)
85-003	1986 OAL Determination No. 2 (Docket No. 85-003)
85-004	1986 OAL Determination No. 3 (Docket No. 85-004)
85-005	1986 OAL Determination No. 4 (Docket No. 85-005)
85-002	1986 OAL Determination No. 5 (Docket No. 85-002)

3. The legal background of the regulatory determination process --including a detailed survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (State Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; looseleaf typewritten version, notes pp. 1-4.
4. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code. Sections 11340 through 11356, Chapters 4 and 5, also part of the APA, do not concern rulemaking.
5. No public comments were received.
6. As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; looseleaf typewritten version, pp. 7-8. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall be published in the California Administrative Notice Register and be made available to . . . the courts." (Emphasis added.) Implementing this directive, this and other determinations are presently being mailed to the clerks of all state and federal courts in California.
7. The Board did not submit a reply to the request for determination. OAL has been informally advised, however, that the Board is now committed to formally adopting regulations. We applaud this decision to follow APA requirements.
8. We conclude that the Board's booklet, in its entirety, is invalid and unenforceable. For discussion purposes we will focus in this Determination on booklet section 1690(a)(3), which sets the amount for annual tax and registration fees. We conclude that section 1690(a)(3) is invalid and unenforceable; however, even if this section were found to pass muster under Government Code section 11347.5, we cite booklet section 1638 (titled "Reciprocity Examination") as a second notable example of an underground regulation. This wholly new provision is not paralleled in the CAC. Section 1638 provides:

"The Board shall issue a physician's and surgeon's certificate on reciprocity to an applicant providing he or she meets the following requirements:

- (a) The applicant must hold an unrestricted license to practice osteopathic medicine in another state whose written licensing examination is recognized and approved by the Board. The Board has determined that the Osteopathic National Board exam parts I, II, and III with a minimum score of 75% on each part is acceptable and a recognized examination.
- (c) The Board determines that no disciplinary action has been taken against the applicant by any medical licensing authority and that the applicant has not been the subject of adverse judgments or settlements resulting from the practice of medicine which the Board determines constitutes evidence of a pattern of negligence or incompetence.
- (d) The applicant takes and passes an oral and comprehensive clinical examination with a minimum grade of 75%."

[Emphasis added; note also that the original does not contain a part (b).]

A total of 16 of the 61 sections in the booklet differ materially from chapter 16 of title 16 of the CAC. Specifically, the inconsistent sections are (as they appear in the booklet):

- 1) Article 2 (1612, 1613, 1619, 1621, 1622, 1623);
- 2) Article 4 (1637);
- 3) Article 5 (1638, 1639, 1640);
- 4) Article 6 (1641); and
- 5) Article 11 (1690, 1691, 1692, 1693, 1694).

The booklet is invalid because it is regulatory in content. Its regulatory content is evidenced by section 1690(a)(3). Assuming section 1690(a)(3) were found valid, the booklet would nonetheless be invalid because of section 1638 and the 14 other materially inconsistent provisions.

9. An osteopath is a practitioner of osteopathy (D.O., doctor of osteopathy). A D.O. basically has the same education and training as a doctor of medicine (M.D.). Business and Professions Code section 2453 provides that "holders of M.D. degrees and D.O. degrees shall be accorded equal professional status and privileges as licensed physicians and surgeons."

Osteopathy is a system of medical practice based on the theory that diseases are due chiefly to a loss of structural integrity in the tissues. This integrity can be restored by utilizing generally accepted physical, medicinal, and surgical methods of diagnosis, therapy and proper diet, while placing chief emphasis on the importance of normal body mechanics and manipulative methods of detecting and correcting faulty structure. See Dorland's Medical Dictionary, 26th ed. (1981), page 943.

10. Stats. 1923, p. xciii. (3A West's Ann. Bus. & Prof. Code (1974 ed.) foll. §3600 at p. 327.)
11. Business and Professions Code, division 2, chapter 5, sections 2000--2529.5.
12. The Osteopathic Act appears in 3A West's Annotated California Business and Professions Code (1974 ed.) following section 3600 at p. 327; and in the last volume of Deering's California Business and Professions Code (1976 ed.), 1986 supplement, Appendix II, following section 25763 at p. 47.
13. Stats. 1923, p. xciii, supra note 10, section 1.
14. Stats. 1962, 1st Ex. Sess., c. 48, p. 337, §4. (3A West's Ann. Bus. & Prof. Code (1974 ed.) foll. §3600 at p. 333.)
15. Alternatively, we find that there is no conflict between the Osteopathic Act's grant of rulemaking power and the Business and Professions Code's requirement that Board rules be adopted in accord with APA requirements. Natural Resources Defense Council v. Arcata National Corporation (1976) 59 Cal.App.3d 959, 965, 131 Cal.Rptr. 172 (harmonize different statutes to give effect to all). Under this analysis the code sections "supplement" but do not "modify" the initiative statute.
16. See note 8, supra.
17. See note 13, supra.

18. Statutes of 1982, ch. 55, p. 183, §1.
19. The term "underground regulations" refers to the enactments outlawed in Government Code section 11347.5: agency rules of a regulatory nature which have been issued or enforced absent compliance with APA requirements.
20. Title 1, CAC, section 121(a) defines "determination" as:

"a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342(b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the Administrative Procedure Act or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

Title 1, CAC, section 121(b) in part defines "request for determination" as a request to issue a determination "as to whether a state agency rule is a regulation as defined in Government Code section 11342(b)." (Emphasis added.)

Title 1, CAC, section 121(c) defines "state agency rule" as:

"any state agency guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule, which has not been adopted as a regulation or filed with the Secretary of State pursuant to the Administrative Procedure Act, Chapter 3.5 of Title 2, Division 3, Part 1 of the Government Code." [Emphasis added.]

21. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (points 1 and 3); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1, 3 and 4); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 3 to today's Determination.
22. See Government Code section 11346, which provides:

"It is the purpose of this article [Article 5 of Chapter 3.5] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the

provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

23. Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104; as cited in 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-34 and n. 14; looseleaf typewritten version, p. 7 and n. 14.
24. See Business and Professions Code section 2451.
25. Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
26. See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
27. See 1986 OAL Determination No. 4 (State Board of Equalization, July 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-13--B-14; looseleaf typewritten version, pp. 9-10 ("law" includes State Constitution).
28. The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
 - a. Rules relating only to the internal management of the state agency. Government Code section 11342(b).
 - b. Rules directed to a specifically named person or group of persons which do not apply generally throughout the state. Government Code section 11343(a)(3).
 - c. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. Government Code section 11342(b).
 - d. Contractual provisions previously agreed to by the complaining party.

29. The significant advantages of public participation in agency rulemaking are noted in NLRB v. Wyman-Gordon Company (1969) 394 U.S. 759, 777-779, 89 S.Ct. 1426, 1436 (Douglas, J., dissenting), quoted in San Diego Nursery Company, Inc. v. ALRB (1979) 100 Cal.App.3d 128, 60 Cal.Rptr. 822, 831:

"The rulemaking procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. Recently the proposed Rules of the Federal Highway Administration governing the location and design of freeways, 33 Fed.Reg. 15663, were put down for a hearing; and the Governor of every State appeared or sent an emissary. The result was a revision of the Rules before they were promulgated. 34 Fed.Reg. 727.

"That is not an uncommon experience. Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See H. Friendly, *The Federal Administrative Agencies* 45 (1962).

"This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

". . .

"Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action."

See also 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-22--B-23, n. 13; looseleaf typewritten version, pp. 2-4, n. 13 (advantages of public participation in agency rulemaking).

30. See California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 510, 131 Cal.Rptr. 744, 751.

31. Fig Garden Park v. Local Agency Formation (1984) 162 Cal.App.3d 336, 343, 208 Cal.Rptr. 474, 478.
32. Bowland v. Municipal Court (1976) 18 Cal.3d 479, 489.
33. Goins v. Board of Pension Commissioners (1979) 96 Cal.App.3d 1005, 1010, 158 Cal.Rptr. 470.
34. See note 31, supra.
35. State Compensation Insurance Fund v. McConnell (1956) 46 Cal.2d 330, 343 (Ins. Code §11734); California Association of Nursing Homes v. Williams (1970) 4 Cal.App.3d 820, 85 Cal.Rptr. 735 (citing Pub. Util. Code §1701 et seq.). See also Alta Bates Hospital v. Lackner (1981) 118 Cal.App.3d 614, 623 and 624 n.5, 175 Cal.Rptr. 196, 201 (former Welfare and Inst. Code §14120(f)--required consultation with concerned provider groups before cutting Medi-Cal reimbursement rates).
36. Conversely, it may also be true that some enactments officially characterized as "rates," "prices" or "tariffs" may nevertheless be substantively indistinguishable from non-exempt "fees." See Winzler & Kelly, supra, note 21, 121 Cal.App.3d at 128 (whether agency action is "regulatory" hinges on effect and impact on public--not on an agency's label.)
37. Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 195-96, 132 Cal.Rptr. 377, 379-380.
38. (5th ed. 1979) p. 553, col. 1.
39. See Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L.Rev. 731 (1975).
40. Id., p. 840.
41. Id.
42. Id., p. 841.
43. See 1986 OAL Determination No. 1 (State Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-10--B-18.

44. See Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321; see also 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; looseleaf typewritten version, pp. 7-8. See note 6, supra.